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No. 77-846

In the Supreme Court of the United States

OCTOBER TERM, 1977

GLEN D. GRAVES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 556 F. 2d 1319.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1977. A petition for rehearing and rehearing *en banc* was denied on October 12, 1977 (Pet. App. 19a). Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to December 11, 1977 (a Sunday), and the petition was filed on December 12, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the prosecution of petitioners for filing statements with the Federal Housing Administration falsely representing that certain down payments had been made denied them due process of law because government employees erroneously informed petitioners that down payments were not required.

STATEMENT

Petitioners were charged in a 42 count indictment filed on March 30, 1976, in the United States District Court for the Western District of Louisiana, with conspiracy to submit false statements to the Federal Housing Administration (FHA) and to defraud the government (count 1), and with the substantive false statement offenses (counts 2-42), in violation of 18 U.S.C. 371, 1010, and 2.

Petitioners filed pre-trial motions alleging that employees of the FHA knew of, acquiesced in, approved, and encouraged the submission of the false statements charged in the indictment, and contending that this constituted governmental misconduct warranting the dismissal of the indictment as a matter of law. The district court held a hearing, at which the government contended that the defense of entrapment could be raised only at trial. Alternatively, it argued that the defense could not be asserted in light of the fact that the FHA employees whose conduct was in question were not authorized to enforce criminal laws. The district court heard testimony from defense witnesses and then dismissed the indictment. On the government's appeal, the court of appeals reversed (Pet. App. 1a-18a).

The evidence adduced by petitioners at the pre-trial hearing is summarized by the court of appeals (Pet. App. 3a-4a). Briefly, it showed that petitioner Graves operated

a construction company and built homes for low-income families who were able to obtain financial assistance through the FHA. Prior to February or March 1971, he complied with FHA regulations each time he submitted a customer's application for financial assistance to the FHA. However, he discovered that several customers, whom he had refused to accept because they did not have the requisite $200 down payment for the housing application, were obtaining FHA approved financing through his competitors. He filed complaints with the local office of the FHA but was informed by FHA employees that he should not be concerned with FHA approval of other applications than his own. Petitioner then obtained approximately 75 affidavits from home buyers who had not furnished the builder with the $200 down payment and presented them to the local director of the FHA. After reading these documents the director informed Graves that a down payment was not essential and that he had authority to waive any of the FHA requirements. According to petitioners, Graves then began accepting applications for FHA approved low income housing without requiring the $200 down payment, and filing false statements with FHA that the payment had been made.

The government cross-examined petitioners' witnesses but declined to present rebuttal testimony, adhering to its initial argument that the defense of entrapment could not be raised in a pre-trial motion to dismiss the indictment. The district court held that the testimony of the defense witnesses established the existence of entrapment as a matter of law and, relying on *United States* v. *Bueno*, 447 F. 2d 903 (C.A. 5), dismissed the indictments because the government failed to produce affirmative evidence to rebut the claim.

The court of appeals, after ruling that petitioners' motion to dismiss the indictment raised a question of law that could be appropriately considered by the district court prior to trial, reversed the order dismissing the indictment. The court held that the facts adduced at the pre-trial hearing did not establish the defense of entrapment as a matter of law and did not establish any deprivation of petitioners' due process rights (Pet. App. 14a-16a). It concluded (Pet. App. 14a):

> There is no indication that the FHA employees here induced Graves to commit unlawful acts for the purpose of prosecuting him for those acts. They acted in concert with him, but he did not become immune from prosecution because they condoned or even encouraged his unlawful activity. Were we to uphold the appellees' defense, anyone dealing with corrupt government bureaucrats could expect to join them in crime without fear of prosecution.

ARGUMENT

1. The petition challenges the court of appeals' reversal of the district court's pre-trial dismissal of the indictment. That reversal, however, places petitioners in the same position as if the district court had ruled against them in the first instance. Since such a ruling would not have been subject to interlocutory appeal (see *Cobbledick* v. *United States*, 309 U.S. 323; *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327), review by this Court of the court of appeals' decision would be premature. At trial petitioners may be acquitted, in which case their claim will be moot. If, on the other hand, petitioners are convicted and the convictions are affirmed on appeal, they will then be able to present all their contentions to this Court by way of a petition for certiorari seeking review of the final judgment.

2. Petitioners do not contend that the facts establish an entrapment defense as that defense has been most recently expounded in *Hampton* v. *United States*, 425 U.S. 484 (see Pet. 3, 8-15). Rather they contend (Pet. 8-15) that the facts establish the kind of due process defense that has been suggested by some statements of this Court—that is, circumstances "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin* v. *California*, 342 U.S. 165 (1952) * * *." *United States* v. *Russell*, 411 U.S. 423, 431-432. See also *Hampton, supra*, 425 U.S. at 489.

The court of appeals correctly concluded that the facts had not established such a defense. At most the facts established that petitioners acted in concert with certain corrupt or irresponsible government employees. There was no evidence or basis to conclude that those employees misled petitioners for the purpose of prosecuting them. Cf. *United States* v. *Bueno, supra*.[1] Moreover petitioners do not claim that their decision to

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[1]The court of appeals held that the district court erroneously dismissed the indictment, because petitioners had not established "the factual predicate for a *Bueno* defense, *i.e.*, a 'full circle' sale of contraband" (Pet. App. 16a). In *United States* v. *Bueno, supra*, the court ruled that where a defendant sells contraband to a government agent that has been furnished by another government agent or informer, entrapment exists as a matter of law. The court of appeals noted that the *Bueno* rule has been seriously questioned since *Hampton* v. *United States, supra*. See *United States* v. *Evers*, 552 F. 2d 1119 (C.A. 5); *United States* v. *Puma*, 548 F. 2d 508 (C.A. 5) (Pet. App. 9a-13a). The court of appeals has subsequently held that *Hampton* overruled *Bueno*. *United States* v. *Benavidez*, 558 F. 2d 308 (C.A. 5).

submit false statements in connection with their applications for FHA financing was urged or even suggested by the FHA employees.[2] We are aware of no case suggesting that a prosecution under these circumstances would deprive petitioners of due process. As the court of appeals concluded (Pet. App. 14a), "[w]ere we to uphold [this] defense, anyone dealing with corrupt government bureaucrats could expect to join them in crime without fear of prosecution."[3]

Petitioners erroneously rely on *Cox* v. *Louisiana*, 379 U.S. 559, and *Raley* v. *Ohio*, 360 U.S. 423, for their

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[2]At most petitioners claim, and the evidence adduced by them at the pre-trial hearing suggests, that certain supervisory personnel at the local FHA office implied to petitioners that the $200 down payment that was required by FHA regulations was not necessary because those individuals had authority to waive the down payment (which petitioner Graves admitted that he knew was required by the regulations (III R. on App. 403)). Petitioners have offered no explanation why, if that were the case, they felt it necessary to submit applications falsely representing that the down payment had been made. At the hearing, a loan specialist at the FHA office who processed applications prior to their review by her superiors testified that she would not process applications unless they contained statements indicating that the required down payments had been made. III R. on App. 294. That testimony suggests the reason why petitioners made the false statements, and would, at trial, support the allegations in the indictment that petitioners submitted "material false statements, knowing the same to be false, for the purpose of influencing the action of the Federal Housing Administration * * *" (I R. on App. 2).

At the hearing petitioners did not call as witnesses the FHA employees who allegedly stated that the down payment was not required, and if the issue is relevant to any defense raised at trial, the government may well prove that no such representations were made.

[3]After the pre-trial hearing, one of the FHA employees who allegedly made erroneous representations to petitioners was indicted and convicted in connection with other acts committed during his employment at FHA.

assertion that they may not be prosecuted for criminal violations where administrative officials have condoned or encouraged their unlawful activity. In *Cox*, the Court reversed a criminal conviction (based on a statute that forbade demonstrations "near" the steps of the court house) because the "highest police officials of the city" in effect advised the defendant that his conduct would not violate the statute. 379 U.S. at 571. In *Raley* v. *Ohio*, the Court reversed criminal convictions where the chairman of the "Un-American Activities Commission" of the State of Ohio apprised the defendants that they could assert the privilege against self-incrimination, and the state then prosecuted the defendants for asserting the privilege. In both cases the due process rights of the defendants were denied by prosecution of their activity, which they had been told was lawful by authoritive agents of the state. Here, petitioners may not complain that their due process rights have been infringed by the prosecution because they were aware from the start that their conduct was unlawful. The fact that they may have been induced to violate the law by government employees who through negligence or design did not enforce their own regulations is immaterial in light of the fact that petitioners were aware that their activity was in direct violation of the housing regulations. The ruling dismissing the indictment was properly reversed by the court below.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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